

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-7083

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

EUGENE E. NERVINA,
Plaintiff-Appellant,

vs.

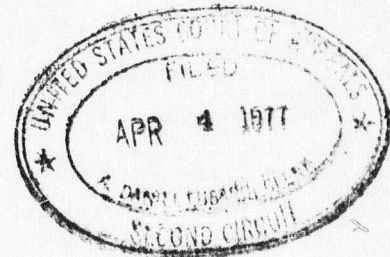
LIEBERT CORPORATION, JOHN AMBROSE, and JAMES
W. GOOD,

Defendants-Appellees.

*On Appeal from the United States District Court for the
Southern District of New York.*

**BRIEF AND APPENDIX
FOR PLAINTIFF-APPELLANT**

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STATEMENT OF THE CASE

This appeal arises out of a summary dismissal by the District Court of Plaintiff-Appellant's (hereinafter referred to as "Plaintiff") Complaint against Defendant-Appellees (hereinafter referred to as "Defendants") Liebert Corporation, James W. Good, and John Ambrose. By way of a summary of the Complaint, Plaintiff alleged three principal causes of action: breach of a sales representative agreement by Defendant Liebert Corporation, and Defendant Good (See Appendix, P. 5); malicious interference by Defendant Ambrose in said contract so as to directly or indirectly cause its breach (See Appendix, P. 7); and the fraudulent conversion of Plaintiff's customer lists by Defendant Liebert Corporation and Defendant Good (See Appendix, P. 5).

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On or about June of 1975, Defendant Good succeeded in persuading Plaintiff to become the sales representative of the New York Region for Liebert Corporation. The company had experienced a drying up of its sales activity in the area and desperately needed the services of Plaintiff, whose expertise and ability was well known in the field. As was true of the previous sales representative of Liebert Corporation for the New York area, Weals and Ward, the Plaintiff was to be a

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separate corporate entity from the manufacturer; enjoying the exclusive right to promote and sell the defendant's product in the area. However, because of the disastrous financial condition of Liebert's sales in the New York region, it was agreed that Plaintiff would be employed temporarily as a manager on a salary and commission basis.

This agreement included a definite understanding on the part of all, that, should Plaintiff be able to develop the New York marketing area, he, at any time, could establish himself as the sole sales representative for Liebert Corporation 10 in the New York marketing area as an independent corporate entity. This understanding was based on the realization that it would be solely through Plaintiff's efforts that an increase would occur in the sales of the corporation in the New York area.

Indeed, after accepting this position the Plaintiff immediately set to work and within ten months had been able to accrue on behalf of the Defendants, solely through his own efforts, net profits in the amount of approximately a hundred thousand dollars (\$100,000.00). It was then financially 20 tenable for Plaintiff to initiate the transition of his operation to a totally independent agency.

However, contrary to the original contract and understanding between the Plaintiff and Defendants Liebert

and Good, Plaintiff was informed that it would be necessary for him to accept a partner in the separate franchise agency, namely, Defendant John Ambrose. Although Defendants conceded that their initial agreement with the Plaintiff had anticipated complete freedom of choice in the designation of associates or partners they had now changed their positions and required that he accept the Defendant Ambrose as a partner. There was no question that should the plaintiff refuse to accept the Defendant as a partner, he would be denied the exclusive franchise or sales representative agency for the Liebert Corporation; which had been specifically promised to him as part of the agreement. The contract, under which Plaintiff had worked and performed for the previous ten months was terminated by the unilateral breach of Defendants in their attempt to alter the terms thereof.

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When Plaintiff began his employment relationship with Liebert Corporation in the Spring of 1975, he was considered a top man in his field in the country. His past successes in the sale of commercial refrigeration and air conditioning systems equipment had made him the ideal choice by Liebert Corporation of a man to turn around their operation in New York.

20

The nature of this sales business depends to a considerable extent on having built up a list of customers

and of consultant engineers on the various projects. Plaintiff's customer list contained thousands of names and contacts to be used in the selling of Defendant corporation's products. The consultant or mechanical engineers are responsible for the design of the computer room and select the type of equipment that goes into each job. They are considered the most influential group of people in the business. Plaintiff's consultant engineer list was invaluable to him in his success in the selling of Defendant products in the New York area.

Plaintiff was persuaded to divulge to the Defendants both his customer list and his list of consultant engineers. Ostensibly, the Defendants Liebert and Good needed these names to place them on their computer at their main office so that mailings could be published to prospective customers on behalf of the Plaintiff. It was pointed out to the Plaintiff by the Defendants that the divulgence of this information to the Defendants would be of benefit to the Plaintiff as well, since they were both now involved in the same endeavor and that the increased sales was an object that they both shared in common.

Shortly after Plaintiff had handed over these lists relying on the assurances of both Liebert Corporation and Defendant Good, Defendants unilaterally breached their agreement with the plaintiff forcing Plaintiff to terminate his relationship

with the defendants.

In settling accounts, the Plaintiff made demand upon the Defendant Liebert Corporation, for certain bonus money, which was due and owing Plaintiff at that time, in the sum of \$23,661.00. Defendant corporation agreed to pay Plaintiff these wages on the condition that upon receipt of same, he would sign the letter dated August 10th, 1976 (See Appendix, P.15 to 16). This letter clearly sets forth its purpose in the first paragraph:

"This letter will set forth the agreement reached by you in Liebert Corporation concerning certain claims you have made against Liebert for compensation." (Emphasis added)

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The letter goes on to say:

"You have claimed that Liebert owes you \$23,661 in payment of certain bonuses to which you are certain you are entitled under an agreement you made with Liebert in or about June 1975. (Emphasis added)

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Clearly the dispute, which was in controversy at that time, was one for compensation claims and had nothing to do with the claims set forth in Plaintiff's Complaint before the District Court; namely, breach of contract, loss of customer lists, and malicious interference with contract. The money which Plaintiff received was in settlement of his compensation claim; wages, commissions and bonuses, and nothing else. A

reasonable reading of the letter in its entirety and its specificity clearly demonstrates this.

The first paragraph of Page 2 of the letter talks of the Plaintiff using the proceeds of the money to pay his taxes for New York City and State. Again, this thus indicating that the money was paid in settlement of wages due. Although Paragraph 2 of the letter also states the Plaintiff agrees to release and discharge Liebert from "any and all claims", this is certainly clarified by the first paragraph of the letter which says that the claims in question were "claims that you have made against Liebert for compensation".

10

Prior to filing an Answer to the action, Defendant moved to dismiss Plaintiff's Complaint pursuant to R12 (b) of the Federal Rules of Civil Procedure on the grounds that the Complaint was barred by an accord and satisfaction and by a release; that the Court lacked jurisdiction over Defendant Good; and that the Complaint failed to state a claim upon which relief could be granted (See Appendix, P 11 to 14). No pretrial discovery had yet been conducted in this matter.

Defendant's Motion to Dismiss on the R12(b) (6) ground was based on affidavits, a letter, and memoranda in support thereof and was likewise opposed by affidavits and briefs in opposition to said Motion to Dismiss. A hearing

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on defendant's Motion to Dismiss was held and the Motion was granted on January 10th, 1977, by the Honorable Dudley B. Bonsal (See Appendix, p. 60 to 61). No written opinion was presented in this matter, nor transcript made of the proceedings. It is from this Order that Plaintiff appeals (See Appendix, P. 62).

INTRODUCTORY

Plaintiff here alleges that he was deprived of his fundamental right to trial on the merits by the District Court's Dismissal of Plaintiff's Complaint.

Allegedly, Defendant's Motion to Dismiss Plaintiff's Complaint prior to the filing of an Answer was based on R12(b) of the Federal Rules of Civil Procedure in that it was barred by an accord and satisfaction and by a release; that the first court failed to state a claim upon which relief could be granted; and that the Court lacked jurisdiction over Defendant James W. Good (See Appendix, P.11, Defendant's Notice of Motion). In fact, however, Defendant's Motion was predicated upon a presentation of matters outside the pleadings. These included Affidavits of Defendant Good, a letter signed by Plaintiff, and Memoranda in support of Defendant's Motion (See Appendix, P.12 to 14, P.15 to 16, P. 17 to 24). Likewise, these papers were opposed by plaintiff's Affidavit and briefs, which clearly set out a factual dispute.

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Defendant's Motion to Dismiss, therefore, was treated as one for summary judgment and disposed of as provided by Rule 56 of the Federal Rules of Civil Procedure.

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POINT I

SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE GENUINE ISSUES OF FACT REMAINED IN DISPUTE WITH REGARD TO THE LETTER OF AUGUST 10th, 1976.

The principle is well established in this Circuit that if there is an issue as to any material fact the motion for summary judgment must be denied. Bridgeport Brass Co. v. Bostwick Laboratories, Inc., 2nd Cir., 1950, 181 F 2d 315; Colley v. Klune, 2nd Cir., 1949, 178 F. 2d 872, as reported in Empire Industries, Inc. v. Mastic Tile Corp. of America, 2nd Cir., 15 FRD 385 (1954), p. 386. This general principle has also been applied in this Circuit specifically to cases involving alleged releases and accord and satisfactions.

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As more fully set out in Plaintiff's Memorandum in opposition to Defendant's Motion to Dismiss (See Appendix, P. 34 to 39), Plaintiff contends that no accord and satisfaction or release existed between the parties for the claims asserted in the Complaint. Plaintiff asserts that the letter of August 10th was a receipt and release solely for past due wages, commissions and bonuses. Clearly only a claim for these rightfully owed wages is mentioned with any specificity in the August 10th letter. Plaintiff's intent was not to release Defendants from any other claims and he received no compensation for any other claims than those for wages. Yet

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Defendants in part base their Motion to Dismiss on this August 10th document.

In 1966, the District Court for the Southern District of New York had an opportunity to address itself to just this issue, Schine v. Schine, 2nd Cir., 254 F. Supp. 986. Defendant in Schine, Supra., based their Motion for Summary Judgment on an alleged release delivered by Plaintiff but which Plaintiff contended was invalid. The Court denied Summary Judgment while refraining from ruling on the validity of the release. This was seen as necessary to allow the Court and/or fact finder the further opportunity to explore the facts and circumstances leading to and attending the release in order to resolve that issue. The opposing factual contentions of the parties as to the release left room for theorizing and speculation, thus necessitating a trial. 10

In Empire Industries v. Mastic Tile Corp. of America, Supra., suit was brought by a distributor of defendant manufacturing corporation's products to recover damages on breach of contract, and for special commissions owed. Defendant's Motion to Dismiss was based upon what it claimed was a general release. Plaintiff's 20 opposition, as in the instant case, was based on the contention that the instrument was merely a receipt for payment; and that

the alleged release, as well as the entire transaction had been tainted by duress.

Plaintiff contended in his affidavit that unless he signed the release he would have faced the prospect of receiving no funds from Defendant for an extended period of time. Although he had further claims against Defendant, business reality as well as the dominant bargaining position of Defendant corporation, necessitated Plaintiff executing the release in order to receive any payment. The defendant urged that even if the Court accepted plaintiff's version of the facts, the Court was compelled to grant summary judgment.

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The Court, refusing to make an ultimate determination as to which side's version of the alleged release was true, refused Defendant's request for dismissal. After reiterating the general rule that if there is the slightest doubt as to the facts, the summary judgment must be denied, the Court went on to apply that principle in striking down Defendant's motion.

In its opinion as to the necessity of trial in such a matter, the Court said:

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"I do not intend to give the impression that I agree with the plaintiff's version of the facts, for if this Court were free to adjudicate the issues presented by the affidavits, I would favor the defendant's version of the facts. However, I have already indicated that if the affidavits raise an issue of fact, which appears material, the ultimate determination as to which side is telling the truth will have to be left to trial." P. 387 (Emphasis added)

Clearly the affidavits and memoranda of defendants and plaintiff in the instant case raise an issue of material fact. These include the intent of the parties in the preparation and signing of the August 10th letter; the construction and meaning of said letter; the exertion of duress on Plaintiff to sign said letter to receive his owed wages from Defendant; and, Defendant's misleading inducement and misrepresentation to Plaintiff to coerce the release of his customer lists.

It must be brought to the Court's attention here, that contrary to defendants' contention, New York Courts have consistently limited releases to apply only to matters which the parties themselves desire to intend. As set forth in Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss (See Appendix, P.34 to 38), this is so even if the claims later raised predated the signing of the release.

Clearly in Empire, Supra., Plaintiff's claims for breach of contract and specific commissions existed and were known to defendant at the time of the signing of the alleged release upon receipt of payment of monies owed. Yet the Court precluded decision on the validity of the release or of plaintiff's further claims until a full trial on the merits. It is this just result that Plaintiff here appeals for.

POINT II

INTENT OF THE PARTIES IN EXECUTING THE AUGUST 10TH
LETTER REMAINED IN DISPUTE WITHOUT ANY FINDINGS OF FACT.

The letter of August 10th is in dispute in regard to its meaning. Its terms are ambiguous and the parties intent as to their meaning are subject to bona fide disputes. The dispute cannot be determined merely by the words of the letter. It must be determined in light of the negotiations of the parties and if in their previous business relationship they ever considered the document to preclude the claims made by Plaintiff's Complaint. Such a determination cannot be made on a 15 minute summary hearing based on hastily drawn affidavits and memorandum and devoid of direct testimony. It can only be determined after trial. Oil Trading Associates, Inc. v. Texas City Refining, Inc., 201 F. Supp. 846 (1962, S.D.N.Y.), United States v. Manufacturers Casualty Insurance Co., 158 F. Supp. 319 (S.D.N.Y., 1957), Farrand Optical Co., Inc. v. United States, 107 F. Supp. 93 (S.D.N.Y. , 1952).

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In Oil Trading Associates, an agent attempted to recover commissions allegedly due him. The agreement between

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the parties although explicitly setting out details as to amounts, prices and dates was declared by the Court to be ambiguous. This was so even though accompanied by affidavits of the parties as to their intentions at the time of execution.

The intent of the parties was obviously in dispute as it is here. The Court denied Summary Judgment requiring any determination to be delayed until trial on the issues. These issues included whether the parties ever considered the questions presented and if they did what their intentions were.

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"Such determination cannot be made on affidavits but can only be determined after trial. It would be premature to grant summary judgment under these circumstances."
P. 849.

Furthermore, as set out in Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss (See Appendix P.34 to 38) the intent of the parties is of crucial consideration in the evaluation of a general release. The determination of intent has also played a vital role in the Court's refusal to grant a Motion for Summary Judgment in cases involving just such a general release as we have at bar.

20

In Hammond Ford, Inc. v. Ford Motor Co., 204 F. Supp. 772 (1962, S.D.N.Y.) an automobile dealer brought suit against the manufacturer for alleged violation of the Automobile

Dealer's Franchise Act and the Sherman and Clayton Acts. Defendant moved for summary judgment asserting a two-pronged argument. First, when Plaintiff resigned his dealership he signed an agreement which operated as a general release of the five separate causes of action Plaintiff later brought. Second, that an accord and satisfaction resulted when Plaintiff signed said release and accepted a payment made to him under the before mentioned agreement, which alleged to release Defendant of "any and all liabilities".

The Court, however, rejected these arguments asserting that there was a bona fide dispute between the parties giving rise to Defendant's claim of a defense based on an accord and satisfaction. The Court went on to say that the intention of the parties must be determined in light of all the background facts and in proper perspective. The Court expressed its opinion that although experienced business people should have known the meaning of the general release and the accord and satisfaction and that:

"Perhaps this is what the parties did intend...The agreement on its face or in words does not show with sufficient clarity that such was their purpose, and clearly this issue should not be disposed of under the summary judgment Rule". P. 775

The Court in the instant case must inquire into

the intent and understanding of the parties. It was premature to grant summary judgment without such an examination. On its face the letter of August 10th released Defendant of any obligation in regards past bonuses due. This claim and only this claim was set out or even mentioned specifically in the letter.

The general release to which defendants allege, contains words similar to those used in the release at issue in Graham v. Taller & Cooper, Inc., 91 F. Supp. 419 (1950 EDNY). There plaintiff alleged that the payment to him was for salary or wages, as Plaintiff Nervina alleged in the case at bar, and that the general language of the release did not foreclose any other claims Plaintiff might have against Defendant.

10

The Court nevertheless required the presentation of testimony to adduce Plaintiff's intent and refused to rely upon the language of the release clause.

"An examination of the cited decisions of the New York Courts teaches that whether a general release is to be treated as including all possible claims depends upon the purpose for which it was given; that even though it be general in form, it cannot be held as a matter of law, that a given claim is barred thereby unless it be shown that the subject matter was actually in question at the time of the release." P. 420 (Emphasis added)

20

Likewise, Summary Judgment should be denied where a question of credibility exists and testimony should be presented to resolve this issue. Evidence must be gathered and weighed and not automatically disposed of on such a dismissal. There exists triable issues of fact involving the credibility of the parties with respect to their meaning and intention in drafting and signing the letter of August 10th, as well as the questions of duress and fraudulent conveyances of customer lists. These issues with respect to plaintiff's cause of action cannot be disposed of on Summary Judgment. Boro Hall Corp. v. General Motors Corp., 164 F. 2d 770 (1947).

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Defendants' counsel incorrectly sets out in his Counter-Statement of Proceedings, Point 2 that Plaintiff's Affidavit of January 4th, 1977, made no reference to his intention not to discharge Defendant from all claims he might have had. This is clearly erroneous.

Plaintiff's Affidavit sets forth his intention that the letter of August 10th and the check received on that date were solely for work performed by him and "for no other reason" (See Appendix, P.27). This surely demonstrates that Plaintiff's intent was not to release Defendant of all future causes of action but merely those in regards to salary compensation.

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Likewise, if defendant intended the document of August 10th to preclude Plaintiff from further claims against them for breach of contract, and fraudulent conversion of customer lists, they, as drafters of said release could have specifically set forth such items in their document. Surely had they done so, the chances of Plaintiff signing such a release would have diminished. Indeed, it was contrary to the intent of the parties to include these causes of action in the August 10th document. Plaintiff has consistently contended that such was not his intent in signing the letter. Without his intent, such a release does not preclude his present causes of action.

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POINT III

LACK OF PRETRIAL DISCOVERY.

At the time Defendant's Motion to Dismiss was heard, no pretrial discovery had been conducted. Plaintiff was yet to have the opportunity to request defendant's responses to pertinent interrogatories or to take defendant's depositions. Through such discovery procedures, Plaintiff could have further narrowed and refined the facts in dispute between the parties. This is especially true in regard to the questions of duress and the alleged fraudulent conversion of plaintiff's customer lists.

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The full gamut of pretrial discovery as set out in Rules 26 - 37 of the Federal Rules of Civil Procedure should have been permitted prior to any determination of the Defendant's Motion. The need to supplement the pleadings and narrow the points of dispute between the parties takes on added urgency in the Federal Court System where the pleadings are not recognized as the basis for trial preparation. Indeed, the functions of the pleadings hardly extend beyond notice. Sunderland, "The Theory and Practice of Pre-trial Discovery" (1937), 36 Mich. L. Rev. 215, at 216.

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The granting of Summary Judgment without the opportunity of pretrial discovery has been denied in the Southern District of New York in Pfeiffer v. Frank, 19 F.R.D. 15 (1955). Defendant's Motion in Pfeiffer, Supra., as in the case at bar, was in part based on Rule 12 (b) (6) of the Federal Rules of Civil Procedure. The Court determined that there was a triable issue of fact with respect to the alleged waiver of Plaintiff pursuant to a contract. This issue could not be disposed of summarily on such a motion. The Court specifically declared:

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"Plaintiff is entitled to his day in court and to the opportunity to conduct such pre-trial discovery as may be appropriate." P. 15 (Emphasis added)

Yet, in the case at bar, the Court summarily dismissed Plaintiff's several causes of actions against three defendants. This dismissal was based, in part, on the affidavit of Defendant Good that never even dealt with the duress or customer lists. These issues of fact, though correctly set out in Plaintiff's Complaint have yet to be dealt with by any Court.

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Plaintiff here contends that prior to any determination on these issues or any of the issues of facts previously set

forth in the instant case, the Trial Court should have made pretrial discovery available to Plaintiff.

POINT IV

SUMMARY JUDGMENT WAS INAPPROPRIATELY GRANTED BECAUSE A MATERIAL ISSUE OF FACT REMAINED IN DISPUTE IN REGARD TO THE FRAUDULENT CONVERSION OF PLAINTIFF'S CUSTOMER LISTS.

Defendant's Motion for Dismissal was granted even though a clear factual dispute existed as regards fraudulent conversion of Plaintiff's customer lists.

The Restatement of Torts Sec. 758, comment (b) defines trade secrets as "any formula, pattern, device or compilation of information which is used in one's business and which gives one an opportunity to obtain an advantage over competitors who do not know or use it."

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Surely Plaintiff's Customer lists and list of computer engineers constituted trade secrets. The general rule is that when a person learns trade secrets by means of a confidential relationship, relief may be obtained against their use to the advantage of the person who so obtains them. Speciner v. Reynolds Metals Co., 177 F. Supp. 291 (1959, D.C., S.D.N.Y.) aff'd 279 F. 2d 337; Franke v. Wietschek, 2nd Cir. 209 F. 2d, 493; Schreyer v. Casco Products Corp., 2nd Cir., 109 F. 2d 921, cert. denied, 342 U.S. 913, 72 S. Ct. 360, 96 L. Ed. 683.

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Defendant Good took advantage of his personal relationship with Plaintiff to convince him to give up this most valuable asset. Defendant Good misrepresented and

fraudulently mislead Plaintiff to believe that his giving up these files to the corporation would be for his benefit since he was to be their sole representative for the New York area. Plaintiff relied to his detriment on these false assurances and suffered the resultant loss. He wished to correctly hold Defendant accountable "under New York law for its use to their (Defendants) own advantage at the expense of Plaintiff." Franke, Supra., P. 496.

This action alleged by Plaintiff in the first count of his Complaint was incorrectly disposed of by the District Court.

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POINT V

SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE A GENUINE ISSUE OF FACT EXISTED AS TO THE EXERTION OF DURESS ON PLAINTIFF TO SIGN THE LETTER OF AUGUST 10TH IN ORDER TO RECEIVE HIS WAGES.

The letter of August 10th was drawn by the corporation using its terms and Plaintiff was required to sign it in order to receive wages, bonuses, and commissions due him.

This threat to withhold past due wages of an employee is an example of the obvious opportunity for duress which often exists between employees and their employers and which does render such an employee's release subject to avoidance. 20 ALR 2d 743 at 746. Plaintiff maintains (See Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, Appendix, P.39to 41), that if the Court construes the letter of August 10th as a release it is nevertheless invalid, having been obtained by duress.

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Threats to withhold wages unless the employee signs a release which he would not have otherwise signed and which he should not have been required to sign as an incident to the payment of wages may constitute duress as to render the release ineffective. 20 ALR 2d 743.

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In direct contradiction to the assertion made by defendants' counsel in the Counter-Statement of Proceedings, Plaintiff surely contended the exertion of duress in his Affidavit of January 4th, 1977 (See Appendix, P.27). As previously said the withholding of wages and compensation for bonuses and commissions for work previously performed may be duress. This charge is specifically made in Plaintiff's Affidavit.

The Trial Court must look into the issue of duress even if it interprets the August 10th letter as a valid release and bar to Plaintiff's present cause of action. This, it has failed to do.

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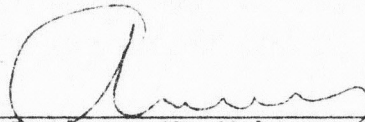
CONCLUSION

The Order of the District Court dismissing Plaintiff's
action should be reversed.

Respectfully submitted,

ANTHONY M. MAHONEY, ESQ.

By



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Attorney for Appellant

DOCKET ENTRIES FROM THE UNITED STATES DISTRICT
COURT ON 76 CIVIL 4841 (pp. 1-2)

DIST/OFFICE	DOCKET YR. NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	H 23	\$	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR. NUMBER
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PLAINTIFFS

NERVINA , EUGENE E.

DEFENDANTS BONSAL J.

LIEBERT CORP.
AMBROSE, JOHN
GOOD, JAMES W.

2/8

CAUSE

28 U.S.C. sec 1332. Breach of sales contract , malicious interference
with sales representative contract, fraudulent usurpation of trade secrets.

jhb

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76 civ 4841

NERVINA -v- LIEBERT CORP et al

76 civ 4841 BENSAL J.

PROCEEDINGS

DATE	NR.	
11-01-76	1	Filed complaint and issued summons .
11-29-76	2	Filed summons and Marshal return of service of the complaint upon : Liebert Corp by cert. mail receipt # 420371 on 11-4-76. James Good by cert. mail receipt # 420372 on 11-4-76 John Ambrose by same on 11-8-76
12-14-76	3	Filed stip & order defts' time to answer is extended to 12/15/76 Bonsal J.
12-16-76	4	Filed notice of motion by defts re: an order pursuant to 12(b) FRCP dismissing the complaint. ret 12/27/76 .
12-16-76	5	Filed memo of law by deft re: support of the motion to dismiss.
12-29-76	6	Filed stip & order defts motion to dismiss the complaint is adj. to 1/10/77 Bonsal J.
1-6-77	7	Fld affdvt by plttf re: opposition to the motion to dismiss the acti.
1-6-77	8	Fld memo by plttf re: opposition to the motion to dismiss.
1-7-77	9	Fld reply affdvt of defts re: support of defts motion to dismiss the complaint.
1-7-77	10	Fld reply memo of defts re: support of the motion to dismiss.
01-10-77		Fld memo end on entry # 4 re: motion granted after oral argument Tenney J. <i>M/N TO M.</i>
01-12-77	11	Fld Judgment defts to have jdgm against plttf dismissing the complaint. Clerk. m/n
02-8-77	12	Fld Notice of Appeal by plttf to the U.S.C.A from the order entered 1/10/77. m/n

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PLAINTIFF'S COMPLAINT AND DEMAND FOR JURY
UNITED STATES DISTRICT COURT (pp. 3-10)
SOUTHERN DISTRICT OF NEW YORK

3

EUGENE E. NERVINA,

Plaintiff

-against-

LIEBERT CORPORATION, JOHN AMBROSE,
and JAMES W. GOOD,

Defendants.

CIVIL ACTION FILE NO.

COMPLAINT AND DEMAND
FOR JURY

EUGENE E. NERVINA, the plaintiff, residing at 100 Manhattan Avenue in the City of Union, County of Hudson, State of New Jersey, complaining of the defendants, LIEBERT CORPORATION, (hereinafter referred to as LIEBERT), a corporation of the State of Ohio, and JOHN AMBROSE, (hereinafter referred to as AMBROSE), a citizen of the State of New York, and JAMES W. GOOD, (hereinafter referred to as GOOD), a citizen of the State of Ohio, says:

FIRST COUNT

1. The jurisdiction of this Court is founded upon Section 1332 of the Judicial Code, 28 U.S.C.A. paragraph 1332.
2. Plaintiff is a citizen of the State of New Jersey and defendants are citizens of the States of Ohio and New York.
3. The matter in controversy exceeds, exclusive of interests and costs, the sum of TEN THOUSAND DOLLARS (\$10,000.00).
4. The plaintiff, EUGENE E. NERVINA, was, at all relevant times hereinafter mentioned, a sales representative and manager for the Liebert Corporation at its New York Office.
5. At all relevant times hereinafter mentioned, the defendant, LIEBERT CORPORATION, was a manufacturer of commercial refrigeration and air-conditioning systems and equipment.
6. At all relevant times hereinafter mentioned, the defendant, JOHN AMBROSE, was an executive with ITT Newbeth Corporation, likewise, engaged in commercial refrigeration and air-

conditioning systems equipment.

7. At all relevant times hereinafter mentioned, the defendant, JAMES W. GOOD, was the sales manager of the Eastern Division of Liebert Corporation.

8. On or about June of 1975, the defendant, JAMES W. GOOD, on behalf of Liebert Corporation, approached the plaintiff at the plaintiff's then employment with a proposition whereby the plaintiff would become the sales representative for Liebert Corporation for the New York Region, thus, replacing the prior agency, Wales & Ward, who previously represented Liebert Corporation as sales representatives.

9. Normally a sales representative in the trade and industry, is a separate corporation, from that of the manufacturer, which enjoys the exclusive right of promoting and selling the product of the manufacturing corporation within a geographical territory or area. The remuneration to the sales representative is based upon a commission on sales.

10. In the instant case, at the time the defendants, through their agents, servants and/or employees, JAMES W. GOOD, approached the plaintiff, their sales performance in the New York area was disastrous. Briefly, they needed the services of the plaintiff to establish and primarily restore their position in this particular marketing area.

11. The plaintiff fully realizing the weak position held by the defendants required that there be a draw against potential commissions in order to make his immediate position as their sales representative financially tenable. This proposition was rejected by the defendants. However, the defendants, LIEBERT and GOOD, did counter with an offer, whereby the plaintiff would manage a corporately held New York Office, drawing a salary and commission with the definite understanding that should the plaintiff be able to develop the New York Marketing area, he, at any time, could establish himself as the sole sales representative

for Liebert Corporation in the New York Marketing area as an independent corporation. This understanding was based upon the realization that it would be the plaintiff's efforts that would solely increase the sales of Liebert Corporation in the New York area. 5

12. The defendants, LIEBERT and GOOD, were well aware of the plaintiff's known sales expertise in refrigeration and air-conditioning systems, as well as his numerous contacts and proven ability to sell and market this type of equipment.

13. Shortly after accepting the defendants' offer, the plaintiff was besieged by requests from the defendant, GOOD, to divulge and make known to the defendants, LIEBERT and GOOD, to various names and contacts the plaintiff would employ in selling the defendants' corporation's products. Ostensibly, the defendants, LIEBERT and GOOD, needed these names to place them on their computer at their Ohio main office so that mailings and list of mailings could be published to prospective customers on behalf of the plaintiff and the New York office. It was pointed out to the plaintiff by the defendants that the divulgence of this information to the defendants would be a benefit to the plaintiff as well as to the defendants, since they were both now involved in the same endeavor and that the increased sales was an object that they were both seeking.

14. The potential customer lists and business contacts were trade secrets, jealously guarded by the plaintiff, and only reluctantly divulged to the defendants after numerous assurances that his interest would be protected. Indeed he was assured that there was no need to worry in as much as the plaintiff was to be the sole sales representative on behalf of the defendant, LIEBERT in the New York Metropolitan area.

15. Consequently, in the late Fall and early winter of 1975, the plaintiff made known his customer lists and business contacts amounting to some seven thousand names and addresses.

see to the defendants, LIEBERT and GOOD.

6

16. Within the first ten months of the plaintiff's association with the defendants, he was able to accrue on behalf of the defendants, LIEBERT and GOOD, solely through his own efforts and endeavors, profits in the amount of approximately a hundred thousand dollars.

17. At or about the time in the late spring of 1976, when the plaintiff was discussing with the defendants, LIEBERT and GOOD, the transition of his operation to a totally independent sales representative office on behalf of LIEBERT CORPORATION for the New York area, he was informed by the defendants, LIEBERT and GOOD, that it would be necessary that he accept a partner, and was further informed that the defendants, LIEBERT and GOOD, would prefer that he accept the defendant, JOHN AMBROSE, as a partner.

18. The defendants, LIEBERT and GOOD, however, conceded that their agreement with the plaintiff has anticipated from the beginning that he would have complete freedom of choice, in the designation of associates or partners and, accordingly, in their initial discussions, they acceded to the plaintiff's requirements that he have the final determination as to whether or not the defendant, AMBROSE, would be a partner in his sales representative office for the LIEBERT CORPORATION.

19. Subsequently, within the next few weeks, on or about late May or early June of 1976, the defendants, LIEBERT CORPORATION and JAMES W. GOOD, changed their position and required over the plaintiff's veto that he accept the defendant, AMBROSE, as a partner in the proposed independent sales representative corporation that he was about to form to represent the defendant, LIEBERT CORPORATION. There was no question that should the plaintiff refuse to accept the defendant, AMBROSE, as a partner, he would be denied the exclusive (franchise) or sales representative area for the LIEBERT CORPORATION, which had been specifically promised to him as part of their agreement.

20. The defendants, LIEBERT and GOOD, breached their oral contract with the plaintiff by unilaterally attempting to alter the terms upon which the plaintiff had worked and performed for the previous ten months and, consequently, the defendants, LIEBERT and GOOD, are answerable to the plaintiff in damages as a result thereof.

21. All of the aforesaid activities have unlawfully deprived the plaintiff of his continued association with the business ventures aforesaid and the beneficial ownership of the exclusive territorial sales representative for the LIEBERT CORPORATION.

22. The loss to the plaintiff, as a result of the breach of the sales representative agreement by the defendants, LIEBERT and GOOD, are in the total amount of TWO HUNDRED THOUSAND DOLLARS (\$200,000.00), which sum represents the loss of profits to the plaintiff as a result of the breach of the agreement aforesaid.

WHEREFORE, on this the First Count of the Complaint, the plaintiff demands compensatory damages against the defendants, LIEBERT CORPORATION and JAMES W. GOOD, in the amount of TWO HUNDRED THOUSAND DOLLARS (\$200,000.00), plus punitive damages, counsel fees and costs of suit.

SECOND COUNT

23. Plaintiff, EUGENE E. NERVINA, repeats the allegations of the First Count of the Complaint and makes them a part hereof as if the same were fully set forth at length herein.

24. At all relevant times mentioned herein, the defendant JOHN AMBROSE, was aware of the contract existing between the plaintiff and the defendants, LIEBERT and GOOD, and none the less, the defendant, JOHN AMBROSE, maliciously interfered with

the contract of the plaintiff so as to directly or indirectly cause its breach and subsequent loss of the exclusive sales representative area to the plaintiff on behalf of the LIEBERT CORPORATION.

WHEREFORE, the plaintiff demands judgment against the defendant, JOHN AMBROSE, on this the Second Count of the Complaint for compensatory damages in the amount of TWO HUNDRED THOUSAND DOLLARS (\$200,000.00) for an accounting punitive damages, interest, counsel fees and cost of suit.

THIRD COUNT

25. Plaintiff repeats and realleges all of the allegations contained in Counts 1 and 2 of the Complaint and makes them a part hereof as if the same were fully set forth herein at length.

26. The customer lists and business contracts consisting of over seven thousand names and addresses belonging to the plaintiff, were trade secrets, and, as such, a property right entitled to the full protection of the laws.

27. The information contained in the lists was only released by the plaintiff to the defendants, LIEBERT and GOOD, with the understanding that the plaintiff was assured and, in fact, had an agreement, whereby he would become the exclusive manufacturers' sales representative as an independent corporation for the LIEBERT CORPORATION in the New York area.

28. The plaintiff was continually assured by the defendant, GOOD, that the plaintiff had to trust the defendants, LIEBERT and GOOD, and that to share the information within the knowledge of the plaintiff, was for the mutual benefit of both parties.

29. Defendants, LIEBERT and GOOD, obtained the information contained on the plaintiff's customers' list by means of misrepresentations and fraudulent inducements upon which the

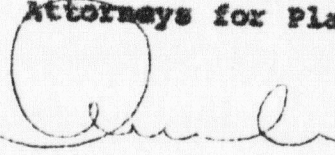
plaintiff relied to his detriment in releasing his valuable claim to trade secrets and customers' list.

30. The plaintiff, in reliance on the representations and statements of present intention made by the defendants, LIEBERT CORPORATION and JAMES W. GOOD, expended great amounts of effort, time and money, as well as the divulgence of trade secrets and customers' lists to the defendants, LIEBERT CORPORATION and JAMES W. GOOD, in order to establish a strong sales representation for the defendant, LIEBERT CORPORATION, in the New York area. The defendants, LIEBERT CORPORATION, and JAMES W. GOOD, fraudulently mislead and misrepresented to the plaintiff and for such are answerable to the plaintiff in damages.

WHEREFORE, the plaintiff demands judgment on this the Third Count of the Complaint against the defendants, LIEBERT CORPORATION and JAMES W. GOOD, in the amount of \$200,000.00 for compensatory damages, punitive damages, counsel fees, and interest and costs of suit.

Dated:

BERNSTEIN & MAHONEY
Attorneys for Plaintiff

By: 

Anthony M. Mahoney

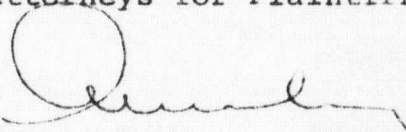
170 Broadway--Suite 201
New York, New York, 10038
(212) 349-1930

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues triable
of right by jury.

BERNSTEIN & MAHONEY
Attorneys for Plaintiff

Dated:

By: 

Anthony M. Mahoney

170 Broadway--Suite 201
New York, New York, 10038
(212) 349-1980

DEFENANTS' NOTICE OF MOTION

11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
EUGENE E. NERVINA, :
Plaintiff, : 76 Civ. 4841 (D.B.S.)
-against- : NOTICE OF MOTION
LIEBERT CORPORATION, JOHN AMBROSE :
and JAMES W. GOOD, :
Defendants. :
-----x

PLEASE TAKE NOTICE that on the summons and complaint herein and on the annexed affidavit of James W. Good, sworn to December 13, 1976, the undersigned will move this Court at the United States Courthouse, Foley Square, New York New York on December 27, 1976 at 9:15, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing the complaint against defendants on the ground that this action is barred by an accord and satisfaction and by a release, and, with respect to defendant Good, on the additional grounds that this Court lacks jurisdiction over his person and that the first count in the complaint fails to state a claim against him upon which relief can be granted.

New York, New York
December 15, 1976

SEWARD KISSEL

By James W. Kissel
Member of the Firm
Attorneys for Defendants
63 Wall Street
New York, New York 10005

TO: BERNSTEIN & MAHONEY
Attorneys for Plaintiff
170 Broadway-Suite 201
New York, New York 10038

DEFENDANT GOOD'S AFFIDAVIT
(pp. 12-16)

12

SOUTHERN DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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----- -x
EUGENE E. NERVINA, :
 :
 : Plaintiff, : 76 Civ. 4841 (D.B.B.)
 :
 : - against - : AFFIDAVIT
 :
 : LIEBERT CORPORATION, JOHN AMBROSE :
 : and JAMES W. GOOD, :
 :
 : Defendants. :
 :
 ----- -x

STATE OF OHIO)
 : ss.:
COUNTY OF FRANKLIN)

JAMES W. GOOD, being duly sworn, deposes and says:

1. I am Manager/Domestic Operations of defendant Liebert Corporation ("Liebert"), and am also a named defendant herein. I make this affidavit in support of the motion to dismiss the complaint against all dependants on the ground that the action is barred by an accord and satisfaction and by a release, and, with respect to myself, on the additional grounds that this Court lacks jurisdiction over my person and that the first count in the complaint fails to state a claim against me upon which relief can be granted.

2. In or about May 1975 Liebert, an Ohio corporation with its main office in that State, decided to open a New York office. I approached plaintiff with a view to having him work for Liebert as a salesman in that office. We had several meetings, some of which may have been in New York City. Plaintiff accepted

Liebert's offer of employment, and began work as a Liebert salesman in or about July 1975.

3. In or about June 1976, Liebert decided to employ a second person in the New York office, and decided to hire defendant Ambrose for that job. Plaintiff objected to Liebert's decision to hire Ambrose, and resigned rather than work with him.

4. A dispute then arose between plaintiff and Liebert with respect to Liebert's obligations to him. This dispute was settled in August 1976. Plaintiff executed a document dated August 10, 1976, a copy of which is attached as Exhibit A. That document provides that in consideration of Liebert making certain payments to plaintiff, plaintiff agreed:

(1) that Liebert will have paid the entire amount [plaintiff] claim[s] it owes [plaintiff], and that the relationship between plaintiff and Liebert is terminated; [and]

(11) to release and discharge Liebert of and from any and all claims, demands, causes and rights of action which [plaintiff], [plaintiff's] successors or assigns, ever had, now have, or which [plaintiff], [plaintiff's] successors or assigns hereafter can, shall or may have for, on or by reason of any matter, cause or thing whatsoever from the beginning of the world to September 1, 1976.

5. I am a resident of the State of Ohio and I was served in that State. While I may have met with plaintiff in New York City for business purposes connected with the events alleged in the complaint, I acted solely in my capacity as Liebert's employee, and I did not engage in a course of conduct on my own behalf.

WHEREFORE, I respectfully request that the motion to
dismiss the complaint be granted.

James W. Goss

Sworn to before me,
December 13, 1976

Thomas M. Tarp
Notary Public

THOMAS M. TARP, Attorney At Law
NOTARY PUBLIC, STATE OF OHIO
LIFETIME COMMISSIONER



Liebert Corporation

1050 DEARBORN DRIVE, P.O. BOX 29186, COLUMBUS, OHIO 43229 • PHONE 614-888-0246 TELEX 246 655

August 10, 1976

Mr. Eugene E. Nervina
100 Manhattan Avenue
Union City, New Jersey 07087

Dear Mr. Nervina:

This letter will set forth the agreement reached by you and Liebert Corporation ("Liebert") concerning certain claims you have made against Liebert for compensation.

You have claimed that Liebert owes you \$23,661.00 in payment of certain bonuses to which you assert you are entitled under an agreement you made with Liebert in or about June 1975. Liebert disputes your claim, and it is Liebert's contention that you are entitled to a bonus payment of \$11,207.69. However, in order to put an end to this controversy, and to avoid substantial expense and the inconvenience of litigating this matter with you, Liebert agrees to pay you the sum you claim is due and owing to you, less an advance payment it made to you of \$400.00, and less federal withholding taxes and F.I.C.A. payments. You have agreed that Liebert shall deduct the \$400.00 advance payment it made you, and federal withholding taxes and F.I.C.A. payments in the amount of \$7372.23.

Liebert will therefore pay you the net sum of \$15,388.77, payable in two checks drawn to your order. The first check will be in the amount of \$7,553.33, and the second check will be in the amount of \$7,835.44. These checks will be delivered to you on August 10, 1976.

Liebert will also continue to pay you your weekly salary to and including August 23, 1976 in the same manner it has paid you in the past. Liebert will deliver your final salary check to you on or about August 28, 1976.

Liebert will also deliver to you a check payable to your order in the amount of \$1,327.65 on or about August 28, 1976. This check represents the funds Liebert has been holding in escrow as security for payment of New York State and New York City taxes owed by you.

Mr. Eugene E. Nervina

- 2 -

August 10, 1976

In consideration of Liebert performing the above, you agree (i) that Liebert will have paid the entire amount you claim it owes you, and that the relationship between you and Liebert is terminated; (ii) to release and discharge Liebert of and from any and all claims, demands, causes and rights of action which you, your successors or assigns, ever had, now have, or which you, your successors or assigns hereafter can, shall or may have for, on or by reason of any matter, cause or thing whatsoever from the beginning of the world to September 1, 1976; (iii) to use the proceeds of the above mentioned check for \$1,327.65 to pay any New York State or New York City taxes which you may owe on any sum Liebert has paid you at any time, and to indemnify and hold Liebert harmless from any claims which may be made against it for New York State or New York City taxes owed by you on any sum Liebert has paid you; and (iv) to return to Liebert all of Liebert's files in your possession, custody or control, to represent that you have returned all of Liebert's files in your possession, custody or control, and to represent that you will not use any information or knowledge you have acquired solely by examination of Liebert's files in aid of any attempt you may make to establish business relationships with any of Liebert's customers.

Please confirm by signing below that this letter correctly sets forth our agreement in this matter.

Very truly yours,

LIEBERT CORPORATION

By James W. Good
James W. Good
Manager/Eastern Division

The above correctly sets forth our agreement and is hereby confirmed. Receipt of two checks payable to my order, one in the amount of \$7,553.33 and the other in the amount of \$7,835.44 on August 10, 1976 is acknowledged.

E. E. Nervina
Eugene E. Nervina

Dated: August 10, 1976

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
COMPLAIN (pp. 17-24)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

EUGENE E. NERVINA,	:	
	:	
Plaintiff,	:	76 Civ. 4841 (D.B.B.)
	:	
- against -	:	
	:	
LIEBERT CORPORATION, JOHN AMBROSE	:	
and JAMES W. GOOD,	:	
	:	
Defendants.	:	
	:	

-----x

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS THE COMPLAINT

This memorandum is submitted in support of the motion to dismiss the complaint against all defendants on the ground that the action is barred by an accord and satisfaction and by a release; and, with respect to defendant Good, on the additional grounds that this Court lacks jurisdiction over his person/and that the first count in the complaint fails to state a claim against him upon which relief can be granted.

Facts*

This action is nothing more than an attempt by plaintiff to reopen a dispute that was settled four months ago. Plaintiff has brought this action against his former employer, Liebert Corporation ("Liebert"), the Liebert employee who dealt with plaintiff on behalf of Liebert, James Good, an Ohio resident, and the person who replaced plaintiff at Liebert when plaintiff resigned, John Ambrose. The complaint ignores that plaintiff executed a document that extinguished any claim he might have had against defendants, and which is an absolute bar to this blatant attempt to obtain a double recovery.

Liebert employed plaintiff as a salesman in its New York office in July 1975. In or about June 1976, Liebert decided to employ a second person in that office, and decided to hire defendant Ambrose. Plaintiff refused to work with Ambrose, and resigned. A dispute then arose between plaintiff and Liebert as to the obligations Liebert owed plaintiff. This dispute was settled in August 1976, and plaintiff executed a

*The facts are more fully set forth in the affidavit of James W. Good sworn to December 13, 1976 in support of the motion.

document dated August 10, 1976 which provided that in consideration of Liebert making certain payments to plaintiff, plaintiff agreed that Liebert had paid the "entire amount" he claimed Liebert owed him, and released Liebert from all claims and rights of action which plaintiff might have had against Liebert.

Plaintiff now seeks to disregard the August 10, 1976 document and brings this action against his former employer and the man who replaced him. Plaintiff has also sued defendant Good, apparently because Good was the Liebert employee who usually dealt with him. Good is an Ohio resident. While he may have come to New York City on occasion to meet with plaintiff, he only did so in his capacity as Liebert's representative, and never on his own behalf.

I

THE AUGUST 10, 1976 DOCUMENT WAS AN ACCORD
AND SATISFACTION AND A RELEASE AND BARS THE
MAINTENANCE OF THIS ACTION AGAINST ALL
DEFENDANTS

The complaint purports to allege two counts against Liebert. The first count alleges breach of an oral contract to establish plaintiff as Liebert's exclusive independent sales representative in the New York area. The second count against

Liebert (the third count in the complaint) alleges tortious fraud and misrepresentation by Liebert in an attempt to obtain plaintiff's trade secrets. Even if plaintiff's allegations were true (which Liebert denies), the August 10, 1976 document bars this action against Liebert. When plaintiff signed that document and accepted payment thereunder he relinquished any claims he might have theretofore had against Liebert. He may not now bring this action in an attempt to recover a second time for these same claims.

A. The August 10, 1976 document was an accord and satisfaction.

Plaintiff signed the August 10, 1976 document, accepted payment under it, and thereby agreed that Liebert had paid him the "entire amount" he claimed Liebert owed him. The document, therefore, is an accord and satisfaction, and bars this action. 1 N.Y. Jur. Accord and Satisfaction §§1, 10. Plaintiff agreed that the relationship between Liebert and himself was terminated, and that he had been paid in full. He cannot now bring this action against Liebert in an attempt at an additional recovery when any obligation Liebert may have had to him was extinguished by the August 10 document. Id. §34.

The August 10 accord and satisfaction also bars the maintenance of this action against defendants Good and Ambrose. An accord and satisfaction between a person damaged and one of several responsible therefor will discharge the others from liability, since a party is entitled to only one satisfaction. When he receives that satisfaction, he is deemed to be fully compensated, his claim is extinguished, and he may not seek recovery from any others who might be liable. Barrett v. Third Avenue R. Co., 45 N.Y. 623 (1871); Littell v. Cranford Co., 203 N.Y.S. 2d 975 (Sup. Ct. Queens Co. 1960). Therefore, even assuming Good or Ambrose might have been liable for breach of contract or tort, (which they deny) the August 10 accord and satisfaction extinguished any such liability.

B. The August 10, 1976 document was a release.

Plaintiff, by the express terms of the August 10 document, released Liebert from all claims, demands, causes and rights of action which he had by reason of any matter whatsoever. This release obviously prohibits the maintenance of this action against Liebert. Any claims plaintiff might have had were extinguished by the release, and this action is barred. 49 N.Y. Jur. Release and Discharge, §§28-29.

The release provision of the August 10 document also bars the maintenance of this action against Good and Ambrose. The release of either party to a master-servant or principal and agent relationship operates to release the other. Gavin v. Malherbe, 146 Misc. 51 (Sup. Ct. Kings Co. 1932), aff'd, 240 A.D. 779 (2d Dep't 1933), aff'd, 264 N.Y. 403 (1934); Magladon v. Bloom, 170 Misc. 832, 11 N.Y.S. 2d 324 (N.Y. City Ct. 1939). Accordingly, this action cannot be maintained.

II

THIS COURT LACKS PERSONAL JURISDICTION
OVER DEFENDANT GOOD, AND THE COMPLAINT
AGAINST HIM SHOULD BE DISMISSED

It is settled that jurisdiction over individual officers and employees of a corporation may not be predicted merely upon jurisdiction over the corporation. Path Instruments International Corp. v. Asahi Optical Co., 312 F. Supp. 805, 810 (S.D.N.Y. 1970). Defendant Good is a resident of Ohio, and was served in that State. He did not take any action in New York on his own behalf in connection with the subject matter of this action. While he may have visited New York City for business purposes connected with the events alleged in the complaint, the complaint does not even allege that he engaged in a course of conduct on his own as opposed to Liebert's behalf. The complaint

should therefore be dismissed against him for lack of personal jurisdiction. Path Instruments International Corp., supra.

III

THE FIRST COUNT SHOULD BE DISMISSED AGAINST
DEFENDANT GOOD BECAUSE IT DOES NOT ALLEGE
THAT HE AND PLAINTIFF ENTERED INTO A CONTRACT

The complaint's first count alleges a breach of a contract to establish plaintiff as Liebert's exclusive independent sales representative. The complaint, on its face, alleges only that the purported contract was entered into by plaintiff and Liebert. It does not even contend that Good was a party to it. That count, therefore, fails to state a claim against defendant Good, and should be dismissed as to him.

The first count alleges that Good approached plaintiff "on behalf of Liebert Corporation," and proposed that plaintiff enter into an agreement with Liebert. It then alleges that plaintiff eventually accepted the offer, and that the contract was breached. Clearly, this count fails to state a breach of contract claim against Good. Good is an employee of Liebert. He negotiated and dealt with plaintiff, not on his own behalf, but on behalf of Liebert. The first count does not even allege a contract between Good and plaintiff. It obviously cannot state a claim against Good for breach of a contract to which he was not a party. It should be dismissed.

Conclusion

For the foregoing reasons, the complaint should be dismissed.

New York, New York
December 15, 1976

Respectfully submitted
SEWARD & KISSEL
Attorneys for Defendants

Anthony R. Mansfield
Jon Paul Robbins
Of Counsel

PLAINTIFF'S AFFIDAVIT
UNITED STATES DISTRICT COURT (pp. 25-27)
SOUTHERN DISTRICT OF NEW YORK

25

-----x
EUGENE E. NERVINA, :
 :
 Plaintiff, :
 : 76 Civil 4841 (D.B.B.)
 - against - :
 :
 LIEBERT CORPORATION, JOHN AMBROSE : AFFIDAVIT
 and JAMES W. GOOD, :
 :
 Defendants. :
 :
-----x

STATE OF NEW JERSEY)
 ss.
COUNTY OF UNION)

EUGENE E. NERVINA, being duly sworn, deposes and
says:

1. I am the plaintiff in the above entitled action.
I make this affidavit in opposition to the motion to dismiss
the Complaint against all defendants on the ground that the
action is barred by Accord and Satisfaction and by release,
and with respect to defendant Good, on the additional grounds
that this Court lacks jurisdiction over his person.

2. In or about May of 1975, Liebert, an Ohio
Corporation, through its agent, James W. Good, who was at that
time, the sales manager for the Eastern United States Region
for Liebert Corporation, approached me at my offices at
101 Park Avenue, New York, New York, with the proposition that
I would become the exclusive agent for the marketing of
Liebert products for the New York region.

3. Several months earlier, the firm that I was
formerly associated with, Cassidy-Poddell, Inc., was approached

by Liebert Corporation with a similar offer but turned it down because of the disastrous sales record which Liebert had in the New York area. Defendant Good was not at that time associated with Liebert Corporation. Subsequent to this defendant Good, who was a personal friend of mine, joined the Liebert organization, and became the sales manager for the Eastern region. It was because of defendant Good's faith and trust in the Liebert Corporation and his personal assurances to me that I decided to accept his proposition and become Liebert's representative for the New York area.

4. For his efforts, defendant Good received from Liebert Corporation a one percent override on all gross sales made by his agents within his region, the Eastern United States. The potential for gross sales in this region is between 8 and 10 million dollars annually, thus, resulting in a potential 80 to \$100,000.00 bonus for defendant Good annually. This override represented a substantial percentage of the compensation which defendant Good earned by doing business in New York.

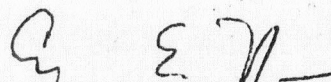
5. At all times relevant herein, defendant Good was a resident of the State of New York, living in Utica, New York, and maintained his offices for the Eastern United States in New York City. In fact, defendant Good shared his offices with mine so that in one office there was the headquarters for the Eastern United States and my office for the New York region.

6. It was because of defendant Good's personal representations and assurances to me and because of our personal friendship that I decided to surrender my customer list

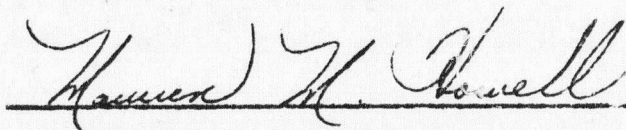
to Liebert Corporation because it had been represented to me that it would be for our mutual benefit.

7. The letter of August 10th, 1976, was only executed by myself after I had been informed on that date by James Good that if I did not sign the aforesaid letter Liebert Corporation would not pay to me the \$23,661.00 due me as compensation for bonuses and commissions for work previously performed. Likewise, it was my understanding that the check I received on August 10th, 1976, was solely for work performed by myself and for no other reason.

WHEREFORE, I respectfully request that the Motion to Dismiss the Complaint be denied.


Eugene E. Nervina

Sworn to before me this
4th day of January, 1977.



MAUREEN M. HOWELL
A Notary Public of New Jersey
My Commission Expires Aug. 30, 1981

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS (pp. 28-47)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EUGENE E. NERVINA,	:	
	:	
Plaintiff,	:	
	:	
- against -	:	76 Civ. 4841 (D.D.B.)
	:	
LIEBERT CORPORATION, JOHN AMBROSE	:	
and JAMES W. GOOD,	:	
	:	
Defendants.	:	
	:	

-----X

MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

This memorandum is submitted in opposition to the motion to dismiss the complaint against all defendants on the ground that the action is barred by an accord and satisfaction and by a release; and, with respect to defendant Good, on the additional grounds that this Court lacks jurisdiction over his person.

STATEMENT OF FACTS

Plaintiff incorporates by reference all of the factual allegations contained in and set out at length in his Complaint in this action, as well as in his attached Affidavit in Opposition to defendants' motion. By way of summary, this is an action for breach of contract, malicious interference of contract, and conversion of trade secrets brought in this Court pursuant to 28 U.S.C.A. 1332, diversity of citizenship jurisdiction.

On or about June of 1975, defendant, James Good, on behalf of defendant, Liebert Corporation, approached the plaintiff with a proposition whereby the plaintiff would become the sales representative for Liebert Corporation for the New York region, thus, replacing the prior agency, Weales and Ward. Liebert's business in the New York region was badly sagging, and defendant, Good was very much aware of the plaintiff's known sales expertise in refrigeration and air-conditioning systems, as well as his numerous contacts and his proven ability to sell and market this type of equipment.

As was true with the previous sales representative of Liebert Corporation for the New York area, Weales and Ward, the plaintiff was to be a separate corporation and entity from the manufacturer, enjoying the exclusive right of promoting and selling

the product of the manufacturing corporation, Liebert. However, because of the disastrous financial condition of Liebert's sales in the New York region, which plaintiff was well aware of, it would have been financially untenable for him to pursue this type of independent agency. Therefore, the plaintiff initially insisted upon a salary from the Liebert Corporation to be drawn against potential commissions. Liebert Corporation rejected this idea but counted with an offer whereby they would employ the defendant as a manager for their New York Office on a salary and commission basis but with a definite understanding that the plaintiff could, at any time, establish himself as the sole sales' representative of the Liebert Corporation in the New York Metropolitan area on an independent agency basis.

After accepting this position the plaintiff immediately set to work and within ten months he was able to accrue on behalf of the defendants, solely through his own efforts, profits in the amount of approximately \$100,000.00. Subsequent to this plaintiff began discussing with defendants, Liebert and Good, the transition of his operation to a totally independent agency sales representative office for the New York area and was informed by the defendants, Liebert and Good, that it would be necessary for him to accept a partner, namely defendant, John Ambrose. This was totally contrary to the original contract and understanding between the plaintiff

and defendants, Liebert and Good.

The defendants, by attempting to alter the terms of their Agreement had thus breached their contract with the plaintiff. Their association was thus terminated and in settling accounts, the plaintiff made demand upon the defendant, Liebert Corporation, for certain bonus money, which had been due and owing at that time pursuant to his employment contract with Liebert and in the sum of \$23,661.00. Liebert Corporation maintained that only \$11,207.69 was owing. However, defendant, Liebert Corporation, mindful of their contract and realizing that any attempt to short change the plaintiff would be futile, acceded to plaintiff's demands and forwarded to the plaintiff the sum of \$23,661.00, less certain tax deductions, and which resulted in the net sum of \$15,388.77, paid out in two checks on August 10th, 1976.

On this date and in receipt of those two checks, the plaintiff signed the letter dated August 10th, 1976, and which is appended, to defendant Good's Affidavit in support of his motion, as Exhibit "A".

This letter by its plain reading clearly shows the dispute in question, settlement of which is evidenced by the letter, to be one for claims for compensation. The first paragraph

clearly sets forth:

"This letter will set forth the agreement reached by you and Liebert Corporation ("Liebert") concerning certain claims you have made against Liebert for compensation."
(Emphasis added)

The letter goes on to say:

"You have claimed that Liebert owes you \$23,661.00 in payment of certain bonuses to which you are certain you are entitled under an agreement you made with Liebert in or about June 1975. Liebert disputes your claim, and it is Liebert's contention that you are entitled to a bonus payment of \$11,207.69."

Clearly the dispute, which was in controversy at that time, was one for compensation claims and had nothing to do with breach of contract for the exclusive franchise to market Liebert's products in the New York Metropolitan area, as well as for the loss of trade secrets and the malicious interference with contract. The \$15,388.77, which was paid to the plaintiff, was in settlement of his compensation claims and nothing else. A reasonable reading of the letter, in its entirety, clearly demonstrates this.

The first paragraph on Page 2 of the letter talks of the plaintiff using the proceeds of his money to pay New York City and State taxes, again indicating that the money was paid in settlement of a compensation claim. Although Paragraph 2 also

states that the plaintiff agrees to release and discharge Liebert from "any and all claims", this is certainly clarified by the first paragraph of the letter, which says that the claims in question were "Claims that you have made against Liebert for compensation".

POINT I

NO ACCORD AND SATISFACTION OR RELEASE EXISTS BETWEEN THE PLAINTIFF AND THE DEFENDANTS FOR THE CLAIMS ASSERTED IN THE INSTANT ACTION.

Defendants maintained that the letter of August 10th, 1976, exhibits an accord and satisfaction between the plaintiff and the defendants. However, an accord and satisfaction, by its very definition, contemplates that there is an agreed upon debt for which the claimant accepts payment of a less sum than is claimed. 1 N.Y. Jur. Accord and Satisfaction, Sec. 1. Clearly, in the instant case, it cannot be said that there was an accord and satisfaction. The plaintiff claimed that the defendant, Liebert Corporation, owed him \$23,661.00, in payment of certain past due bonuses, which were due and owing. That is the exact amount which was paid to him, minus certain tax deductions, and which payment is evidenced by the letter of August 10th, 1976. There was no accord and satisfaction because the plaintiff did not accept a lesser amount than that which he claimed was due him.

Moreover, the letter of August 10th, 1976, is not evidence of a Release, other than for any claims which the plaintiff might have for past due bonuses. A release should not be construed to dispose of matters, which the parties themselves do not desire to intend. Dury v. Dunadee, 52 A.D. 2d 206, 383,

N.Y. Supp., 748 (App. Div. 1976). Although the effect of a General Release, in the absence of fraud or mutual mistake, cannot be limited or curtailed, its meaning and coverage necessarily depend upon the controversy being settled, and the purposes for which the Release was actually given; and a release may not be read to cover matters which the parties did not desire or intend to dispose of. Sage v. Hale, 80 Misc. 2d 812, 364 N.Y. Supp. 2d. 781 (Sup. Ct., Saratoga Co. 1975).

Thus, the Supreme Court of New York, Appellate Division, has held that where a stockbroker had two items of grievance with a broker dealer, one for failure to deliver purchased stock, and another for misrepresentation and overcharging, and the action with respect to failure to deliver was settled with a General Release limited to "any and all claims alleged", the buyer was free to maintain an action for alleged misrepresentation and overcharging. Bober v. McDonald & Co., Inc., 36 A.D. 2d. 940, 321 N.Y. Supp. 2d 474, (App. Div. 1st Dept., 1971).

Similarly, in the instant case, it is quite clear from the letter of August 10th, 1976, that the plaintiff and the defendants at that time meant to settle their dispute with regard to the amount of bonuses that were then past due and owing to the plaintiff. The letter is evidence of settlement of that

dispute. But it is clear from the letter that there is no intention to settle any other disputes or grievances which the plaintiff had and certainly no intent to release the defendants for the claims alleged by the plaintiff in the instant action. As set forth in the Statement of Facts, the letter quite clearly states:

"Certain claims you have made against Liebert for compensation".

Nothing was said about the breach of Liebert's Agreement to confer upon the plaintiff the exclusive franchise to sell Liebert Products in the New York Metropolitan Region, nor was any compensation paid to the plaintiff for the loss of his customer list, a jealously guarded trade secret.

In determining what claims or causes of actions are covered by a Release much depends upon the purpose for which it was executed. Topat Equipment Co. v. Porter, 50 A.D. 2d 1098, 377 N.Y.S. 2d 339 (App. Div., 4th Dep't 1975). Analogous to the case sub judice is the case of Meyers v. Hussey Realty Corp., 45 N.Y.S. 2d 137 (Sup. Ct., Trial Term, N.Y. Co., 1943). In that case, the plaintiff broker, had succeeded in securing a lease on a commercial property for a 21 year term, at an annual rent of \$150,000.00, with an option for a second renewal for a similar term. For his efforts, the plaintiff broker was paid a commission in the

amount of \$31,000.00, for which he signed a Release. However, pursuant to an oral agreement the plaintiff broker was entitled to a \$32,500.00 commission from the defendants upon renewal of the lease by the leasee. Twenty-one (21) years later, when the lease was renewed, the broker made demand for his commission, which demand was not met.

The broker brought suit and the defendants alleged as a defense the release signed 21 years earlier. The Court held that it was its duty to read the release in light of the circumstances surrounding its creation and found that foremost among these circumstances was:

"The fact that it was executed by plaintiff on the occasion when he was being paid the commission he had earned, and to which he was absolutely entitled. In form, Exhibit A, is both the receipt (for the \$31,000.00 paid to the plaintiff for his commission for the original 21 year term of the lease), and a release. It was therefore proper that plaintiff should then have given his receipt for that money. There was, however, no reason why he should have done anything more than give a receipt therefor. He had received nothing other than that which was then legally due him.

The alleged release of any future liability to the plaintiff was wholly therefore without consideration. The

defendant was at that time bound to pay the \$31,000.00 to plaintiff. It paid him nothing beyond that. Manifestly the release had no consideration to support it." 45 N.Y.S. 2d at 139.

Similarly, in the instant case, the plaintiff upon receiving the \$23,661.00, minus taxes, which he was entitled to, signed a receipt for that amount and released the defendants for that amount. He received nothing more than he was absolutely entitled to for those claims and a release for any other claims would be without consideration. Clearly, that was the intent of the parties when the letter was drafted and clearly, that was the intent of the plaintiff when he signed it. There would be no reason for him to release the defendants from any other claims, when he was receiving no compensation for such a release.

Thus, the letter of August 10th, 1976, does not evidence any form of release by the plaintiff to the defendants for the claims asserted by the plaintiff in the within action.

POINT II

ASSUMING ARGUENDO THAT THE LETTER OF AUGUST 10th, 1976, IS A RELEASE, IT IS NEVERTHELESS INVALID AS HAVING BEEN OBTAINED BY DURESS.

It is well settled that the releases are contracts whose interpretations are governed by the general principals of contract law. Dury v. Dunadee, 52 A.D. 2d 206, 383 N.Y.S. 2d 748 (App. Div. 1976). As such releases which are the product of overreaching or duress are not binding upon the Court. Parker v. United Truck Rental Co., Inc., 21 Misc. 2d 246, 190 N.Y.S. 2d 250 (Sup. Ct., Kings Co. 1959); Williams v. Macchio, 69 Misc. 2d 94, 329 N.Y.S. 2d 405 (Sup. Ct., Queens Co. 1972).

Thus, where it was claimed by the owner of bonds and mortgages that a release was given to the guarantor, solely to obtain management and control of the bonds and mortgages as promptly as possible, the Supreme Court, New York County, held that if such were true, the release would be void for duress of goods or property. People by Van Schaick v. New York Title & Mortgage Co., 150 Misc. 239, 270 N.Y. Supp. 26 (Sup. Ct., N.Y. Co., 1934).

Likewise, in an action to recover money for goods sold and delivered, and for services rendered, the Supreme Court, Kings County, held that the refusal of the buyer to turn over money to which the seller was rightfully entitled, unless a formal

release was given, constituted duress of goods vitiating the transaction. Weiner v. Tele King Corporation, 123 N.Y.S. 2d 101, (Sup. Ct., Kings Co., 1953). In that case the court stated:

"The doctrine has been recognized that where one party has possession or control of the property or another, and refuses to surrender it to the control and use of the owner, except upon compliance with an unlawful demand, a contract by the owner, under such circumstances, to emancipate the property is to be regarded as made under compulsion and duress." 123 N.Y.S. 2d at 104.

Similarly, in the instant case, the plaintiff was forced to sign the letter of August 10th, 1976, in order to emancipate the \$23,661.00, which was rightfully his and which was due and owing to him from the defendants for bonuses to which he was lawfully entitled. The plaintiff, by the very nature of his business, depends for a substantial portion of his income on bonus payments and commissions and the plaintiff was in severe financial need of this money. Moreover, it was quite clear that he would not have received the money that he was entitled to had he not signed the letter of August 10th, 1976.

Therefore, even assuming arguendo that the letter of August 10th, 1976, constitutes a release as to the causes of action of the plaintiff as set forth in his complaint, nevertheless

such a release is totally invalid as it had been obtained by duress on the part of defendants in that property, lawfully belonging to the plaintiff, had been withheld from him and would continue to be so withheld from him had not the plaintiff emancipated said funds by signing the letter of August 10th.

Moreover, it has been held that the repayment of the amount received on giving a release was not a prerequisite to the maintenance of an action in which the defendant interposed the defense of a general release and in which the plaintiff claimed the invalidity of said release. Skipworth v. Cooper, 325 N.Y.S. 2d 485, 37 A.D. 2d 906 (App. Div., 1971).

Since no release was given to the defendant Liebert Corporation or in the alternative, if a release was given, it was given under duress and its effect is therefore vitiated, then, in either event, defendants Good and Ambrose, are likewise not immune from liability under the instant suit.

POINT III

PERSONAL JURISDICTION EXISTS OVER DEFENDANT GOOD.

Defendant, in his brief, alleges that this Court lacks personal jurisdiction over defendant Good on the grounds that jurisdiction over individual offices and employees of a corporation may not be predicated merely upon jurisdiction over the corporation, and cites as authority Path Instruments International Corp. v. Asahi Optical Co., 312 F. Supp. 905 (S.D.N.Y. 1970). Defendant alleges that Mr. Good is a resident of Ohio and was served in that state and took no action in the State of New York on his own behalf in connection with the subject matter of this action, but only for business purposes on behalf of defendant, Liebert Corporation.

Similarly, defendant Good in his affidavit alleges that he had "several" meetings with the plaintiff, "some of which may have been in New York City" and that he is a resident of Ohio and that he did not engage in a course of conduct on his own behalf in New York, but that any actions were on behalf of Liebert Corporation. Such is not the case.

At the time of the incidents referred to in the complaint, defendant Good was a resident of the State of New York living in Utica, New York. Furthermore, defendant Good, at the time of the incidents referred to in the complaint was not the manager/domestic operation of defendant, Liebert Corporation, as he now states his position to be in his Affidavit, but rather was the sales manager

for the entire eastern region of the United States for Liebert Corporation. Moreover, defendant Good's offices were shared with the plaintiff's offices in New York City. That is, plaintiff as the sales representative for the New York region, shared office space with defendant Good, the sales manager for the eastern United States, who was working out of New York City.

The Path Instruments' case, cited by the defendant in his brief, was decided on the ground that the plaintiff in that case did not allege any cause of conduct on behalf of the corporate employee defendants for their own individual benefit nor could the plaintiff in that case allege a course of conduct sufficient to constitute doing business under the New York State Long Arm Statute.

The New York State Long Arm Statute, C.P.L.R., Section 302, provides in pertinent part:

"a. Acts which are the basis of jurisdiction.

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his Executor or Administrator, who in person or through his agent:

1. Transacts any business within the state; or
2. Commits a tortious act within the state, except as to a cause of action for defamation of character arising from that act;..."

In the instant case, defendant Good transacted business within the State of New York and committed a tortious act within

the state, not only on behalf of the defendant, Liebert Corporation, but in his own individual and personal interest. Defendant Good as a sales manager for the eastern region of the United States received a one percent override of all gross sales made within the eastern region of the United States. The potential for gross sales for the eastern region of the United States is between eight (8) and ten (10) million dollars a year making his share of bonuses close to eighty (80) to one hundred (100) thousand dollars annually. Just in the first ten months that the plaintiff was associated with Liebert Corporation, he accrued gross sales in the amount of six hundred thousand dollars making a six thousand dollar bonus payable to defendant Good.

Defendant Good received his bonus purely through the efforts of the plaintiff. Defendant Good was the individual who, on behalf of Liebert Corporation, first contacted the plaintiff with the proposition of him becoming the New York area representative. Defendant Good was a personal friend of the plaintiff and knew first hand of the plaintiff's ability and specifically wanted the plaintiff to assume this job because the defendant realized that it would result in increased bonuses for himself personally. Likewise, and for this reason, defendant Good was personally desirous of obtaining plaintiff's customer list because defendant Good realized

that this customer list was the key to splitting the New York area wide open and that with this customer list defendant Good was, with or without the plaintiff, in the position to realize huge profits and bonuses individually, as well as on behalf of his employer, Liebert Corporation. Indeed, plaintiff parted with this customer list only because of the personal assurances and representations made to him by defendant Good who used his personal friendship with the plaintiff to deceive and lure the plaintiff into surrendering his customer list to him.

This is alleged in the third count of the complaint starting at paragraph 38. Plaintiff, would not have surrendered this customer list to just anybody, but was rather deceived into surrendering it by the tortious misrepresentations and deceit exerted upon him by defendant Good.

The New York Metropolitan area being the largest metropolitan area within the eastern region, of which defendant Good was the Manager of, defendant Good realized that this area, if fully utilized, had the greatest potential for gross sales, and thus the greatest potential for bonus money to which he is individually entitled. It was therefore to Good's advantage to exploit the plaintiff for his customer list so that he could open up the New York area with or without the plaintiff and still receive huge bonuses. Therefore, it is ludicrous to say that the defendant in luring the plaintiff out of his customer list was acting solely on behalf of the corporation. Clearly he was acting as well, if

not more, on his own behalf because of the bonus incentive which he had. Likewise, any bonus money that the defendant Good made individually through the use of the plaintiff's customer list is clearly the result of his individual actions and the defendant Good is therefore personally liable to this court's jurisdiction under the New York State Long Arm Statute. It is clear that he not only committed a tortious act within the State but also transacted business within the State.

Defendant Good did not just visit New York City every once in a while as was the case with the corporate employee defendants in Path Instruments, Super., but rather lived in New York, was a resident of New York and had his offices in New York.

Defendant Good would have us believe that he was just another 9 to 5 corporate employee who happened to visit New York several times. Clearly this is nonsense. Defendant Good received substantial bonuses which formed a substantial part of his income. Thus, he was as much self-employed and individually employed as he was corporately employed. Therefore, his actions were likewise as individually motivated as they were corporately motivated. Defendant Good used and abused the personal friendship and trust of the plaintiff for his personal gain in obtaining the customer list of the plaintiff for his sales region and therefore properly subject to the jurisdiction of this Court imposed via the Long Arm Statute.

CONCLUSION

For the foregoing reasons, the motion of defendants to dismiss the complaint should be denied.

Respectfully submitted,

Anthony M. Mahoney, Esq.
Attorney for Plaintiff
170 Broadway - Suite 201
New York, New York 10038

Dated: January , 1977.

REPLY AFFIDAVIT OF DEFENDANTS' COUNSEL
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

48

(pp. 48-49)

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EUGENE E. NERVINA, :
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Plaintiff, : 76 Civ. 4841 (D.B.B.)
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-against- :
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LIEBERT CORPORATION, JOHN AMBROSE : REPLY AFFIDAVIT
and JAMES W. GOOD, :
 :
Defendants. :
 :
----- x

STATE OF NEW YORK)
 : ss.
COUNTY OF NEW YORK)

JON PAUL ROBBINS, being duly sworn, deposes and says:

1. I am associated with the firm of Seward & Kissel, attorneys for defendants, and I make this affidavit in support of defendants' motion to dismiss the complaint.

2. On August 10, 1976 I met with plaintiff and defendant James Good in the offices of Seward & Kissel. I gave plaintiff the August 10, 1976 document relied on by defendants in this action. Plaintiff read the document, and asked if he could call his attorney and ask if he should sign the document. I told plaintiff that he of course could speak to his attorney, and I showed him to a telephone in our office where he could make the call in private. A few minutes later plaintiff came back, said he had not been able to reach his attorney, and that he did not want to sign the document before speaking to him. Plaintiff and Mr. Good then left the offices of Seward & Kissel. Mr. Good went to Liebert Corporation's New York office, and Mr. Nervina went to get certain files of Liebert, which he had in his possession, and which he had agreed to return to Liebert. It was agreed that plaintiff would try to contact his attorney, and would sign the August 10 document if his attorney approved.

3. Later that afternoon, Mr. Good telephoned me. Mr. Good informed me that plaintiff had said he had been in touch with his attorney, that his attorney had said the document was satisfactory, and that plaintiff had therefore executed and delivered the document.

4. In view of the above facts, plaintiff's contentions that the release provision of the August 10 document, despite its clear language, should be limited to permit the maintenance of this action, and that, in any event, he signed the document under duress, are insupportable. Plaintiff consulted with his attorney; he had every opportunity to have the terms of the document explained to him. Plaintiff was apparently advised to sign the document, and he did so. No one forced him to sign - he decided that he should execute the document, and he did. He cannot now attempt to limit the document's terms or effect, or to argue that he signed under duress.

Jon Paul Robbins
 Jon Paul Robbins

Sworn to before me
 January 7, 1977

Alice Bloom
 Notary Public

ALICE BLOOM
 Notary Public, State of New York
 No. 24-00000
 Qualified in Westchester County
 Commission Expires 12/31/78

REPLY MEMORANDUM IN SUPPORT OF MOTION TO
DISMISS COMPLAINT (pp. 50-59)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EUGENE E. NERVINA, :
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Plaintiff, : 76 Civ. 4841 (D.B.B.)
 :
-against- :
 :
LIEBERT CORPORATION, JOHN AMBROSE :
and JAMES W. GOOD, :
 :
Defendants. :
 :
----- x

REPLY MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS THE COMPLAINT

None of the cases plaintiff cites is in point. In an attempt to misdirect the Court, plaintiff has relied on cases where releases were asserted against causes of action that were not in existence at the time the releases were executed, and to which the releases could not possibly apply. Any claims plaintiff had against defendants arose prior to plaintiff's execution of the August 10, 1976 document. The release provision in the August 10 document, by its express terms, was intended to discharge all pre-existing claims, and it should be given the effect which its language demands.

Plaintiff has also cited cases where the releases contained language limiting their effect to a particular claim,

and argues those decisions apply because the August 10 document refers to the bonus dispute between Liebert and plaintiff. Plaintiff ignores the crucial distinction between those cases and the one at bar. The release provision in the August 10 document, the provision in the document relied on by defendants, does not refer or limit its application to a particular claim. Its language is general and all inclusive, and plaintiff cannot limit its effect.

1. The August 10, 1976 document released all claims plaintiff might have had against defendants.

The law in New York has always been that the effect of a release is not limited to the preliminary discussion that led up to its execution if the parties intentionally include in the instrument demands not previously suggested or all subsisting causes of action. Although only certain demands have been discussed, the release will be operative according to its terms, and will discharge all claims the releasor may have had against the party released. Kirchner v. New Home Sewing Mach. Co., 135 N.Y. 182, 31 N.E. 1104 (1892). A release which is general in its terms will dispose of all demands, obligations, and claims in existence between the parties to the instrument at the time of the execution of the release. Lucio v. Curran, 2 N.Y. 2d 157, 157 N.Y.S. 2d 948 (1956); Kirchner v. New Home Sewing Mach. Co., supra; Mittendorf v. Williston & Beane, Inc., 372 F. Supp. 821, 836

(S.D.N.Y. 1974). The "claims" plaintiff alleges in the complaint were in existence at the time he executed the release, and they are barred by that release.

Lucio v. Curran, supra, is directly in point. The terms of the release discharged all "causes of action, suits . . . controversies . . . claims and demands whatsoever." Plaintiff in that case argued, as plaintiff does here, that he had not intended to discharge the claim he was suing on, and the release should be limited to the claim he "meant" to discharge. The Court of Appeals rejected plaintiff's argument, and held the release barred the action because the

words of general release are clearly operative not only as to all controversies and causes of action between the releasor and releasees which had, by that time, actually ripened into litigation, but to all such issues which might then have been adjudicated as a result of pre-existent controversies . . . and notwithstanding plaintiff's intent to commence a further suit for redress. 2 N.Y. 2d at 161-162, 157 N.Y.S. 2d at 952.

Similarly, plaintiff here gave a general release, and its words are "clearly operative" as to all existing claims plaintiff had against defendants, regardless of whether he later intended to bring a suit based on some of those claims. The "causes of action" plaintiff asserts in the complaint arose before plaintiff gave the release, and he is bound by the release's discharge of those claims. Lucio v. Curran,

supra, 2 N.Y. 2d at 162, 157 N.Y.S. 2d at 952; Mittendorf v. Williston & Beane, Inc., supra, 372 F. Supp. at 836. This is especially so since plaintiff consulted counsel before he executed the release, and counsel presumably explained its meaning to him. Viskovich v. Walsh Fuller-Slattey, 16 App. Div. 2d 67, 225 N.Y.S. 2d 100 (1st Dep't 1962), aff'd, 13 N.Y. 2d 1100, 246 N.Y.S. 2d 632 (1963). Plaintiff may not now be heard to argue, after reading the release, consulting counsel and executing it, that the release should be limited in a manner plainly inconsistent with its terms.

The cases plaintiff cites do not apply. They involve actions where the release asserted as a defense was limited by its terms to a particular claim, or where the release was given before the claim sued upon came into existence. Dury v. Dunadee, 52 App. Div. 2d 206, 383 N.Y.S. 2d 748 (4th Dep't 1976), is typical of the cases plaintiff relies on. The general language of the release provision was followed by a reference to a particular claim, which was different from that sued upon, and against which the release was asserted. The court held the general language of the release might be limited by the reference to the particular claim which followed it. The court also noted that this was a personal injury case, where special rules of interpretation apply when the damages sought were unknown at the time the release was given. Dury has no application. The general language of the release

provision in the August 10 document is not followed by a provision limiting its application to plaintiff's claim for bonuses. Further, this is not a personal injury case, and plaintiff's claims, if any, were in existence when he signed the August 10 document.

Sage v. Hale, 80 Misc. 2d 812, 364 N.Y.S. 2d 781 (Sup. Ct. Saratoga Co. 1975), another personal injury case, is not applicable, although the court's discussion is instructive. The court cited Lucio v. Curran, supra, and Kirchner v. New Home Sewing Mach. Co., supra, and agreed that the general rule is that the effect of a general release cannot be limited or curtailed. The court distinguished those two decisions on the grounds that, in the case before it, the cause of action sought to be barred was not in existence at the time the release was given, and the general language of the release was followed by a provision stating it was for a particular injury. The case at bar is the same as Lucio and Kirchner, and is distinguishable from Sage. Plaintiff's causes of action arose before he gave the release, and the release provision of the August 10 document does not contain any words of limitation.

Bober v. McDonnell & Co., 36 App. Div. 2d 940, 321 N.Y.S. 2d 474 (1st Dep't 1971) clearly is not in point. There, an action was settled and a release was given which was "limited to any and all claims alleged" in the settled

action. Plaintiff here did not "limit" his release to any particular claim; to the contrary, he gave a general release of "any and all claims." Nor is Topat Equipment Co. v. Porter, 50 App. Div. 2d 1098, 377 N.Y.S. 2d 339 (4th Dep't 1975), applicable. That case also involved a release provision that was limited to a particular claim. The defendant did not even raise the release as a defense in its answer, and the court held this failure was evidence the defendant knew the release did not apply to the claim asserted.

Meyers v. Hussey Realty Corp., 45 N.Y.S. 2d 137 (Sup. Ct. N.Y. Co. 1943), on which plaintiff relies heavily, is also distinguishable. Defendant asserted a release as a bar to an action which was based on events which did not occur until 21 years after plaintiff executed the release. The court properly found that plaintiff had only released defendant for claims he had at the time of the release, not claims that might arise 21 years later. At the time plaintiff gave the release he had no other claims, and there was no assurance he ever would have any other claims. The release did not state that plaintiff was giving up claims that might arise as a result of future events, and the court correctly refused to interpret it as doing so. But in the instant case any claims plaintiff might have had existed when he gave the release, and the release itself states that plaintiff discharged "any and all claims" he had.

Plaintiff here is attempting to place an artificial limitation on a general release. The wording of the release is clear. Plaintiff gave up any claims he might have had, and he may not now avoid the clear import of the document he executed, and under which he accepted payment.

2. Plaintiff did not sign the release under duress.

In an effort to avoid the clear language of the August 10, 1976 accord and satisfaction and release, plaintiff attempts to insert a nonexistent element of "duress" into this case. This Court should not countenance such an attempt.

Liebert and plaintiff had a dispute over the amount Liebert owed plaintiff. In a desire to compromise the dispute, and to avoid litigation, Liebert made the business decision to pay plaintiff more than Liebert believed it owed. In consideration for this payment, Liebert required plaintiff to execute a general release. Plaintiff cannot now make the bald assertion in his memorandum of law that he was coerced into executing the release, an assertion which is not even supported in plaintiff's affidavit in opposition to the motion. Plaintiff's affidavit does not allege he was coerced into signing the August 10 document. The affidavit alleges only that Liebert would not settle with him unless he executed it. Of course, this is true. Liebert would naturally not make a substantial payment unless it had a reasonable assurance that plaintiff

could not bring an action against it, or, if he did, that such an action would be dismissed. Since there is no evidence of duress (counsel's contention in a memorandum is no substitute for an affidavit), the Court should dismiss the contention summarily. This is especially so in view of the fact that plaintiff had the opportunity to consult counsel before he signed the August 10 document. No one told plaintiff he had to sign - he decided to do so of his own free will. The effect of the release cannot now be vitiated by an unsubstantiated allegation of duress.

3. The August 10, 1976 document was an accord and satisfaction.

Plaintiff's only argument that the August 10, 1976 document was not an accord and satisfaction is that he was paid the exact amount he believed Liebert owed him, and therefore there could not have been an accord. The very existence of this lawsuit is proof that is not so. Plaintiff bases the complaint on acts which are all alleged to have occurred before August 10. If there was any breach of contract, malicious interference with contract rights or conversion of trade secrets (which defendants deny), plaintiff's "claims" were existing and matured before August 10, and he suffered damages by that date - damages which he claims are at least \$600,000. Yet he settled for substantially less, and accepted payment of a smaller amount than he believed was due

him. This meets the hornbook definition of an accord and satisfaction, and is dispositive of the instant case. When plaintiff accepted payment under the August 10 document his claims were satisfied and he lost any right he might have had to recover from defendants.

4. This Court lacks jurisdiction over defendant Good.

It is irrelevant that defendant Good was a New York resident at the time some of the acts alleged in the complaint are supposed to have taken place. He was not a New York resident at the time he was served with the summons and complaint, and this Court may exercise jurisdiction over him only if, while he was a resident of New York, he committed an act which would subject him to long-arm jurisdiction under CPLR 302. See State v. Davies, 24 App. Div. 2d 240, 265 N.Y.S. 2d 358 (3rd Dep't 1965), aff'd, 18 N.Y. 2d 950, 277 N.Y.S. 2d 146 (1966); McLaughlin, Practice Commentaries to CPLR 302, 7B McKinney CPLR 302 at 70. Good did not commit any of the prescribed acts, and this Court lacks jurisdiction over his person.

Plaintiff's theory seems to be that, since Good would benefit if Liebert was successful, Good's acts in New York were for his own account as well as Liebert's. If this theory were correct, a corporate employee would always be subject to personal jurisdiction if he came to New York on his corporation's business.

Path Instruments International Corp. v. Asahi Optical Co., 312 F. Supp. 805 (S.D.N.Y. 1970) held this is not the case. Generally speaking, a corporate employee will derive some benefit if his corporation is successful. This especially may be true if the corporation is successful as a direct result of the employee's efforts, since he then may receive a raise in pay or a promotion. This does not, however, mean that the employee is deemed in law to be acting on his own as opposed to his company's behalf. The holding of Path Instruments is that when an employee is in New York on his employer's business he is not considered to be here in his personal capacity, and his acts do not subject him to personal jurisdiction in this State. Plaintiff does not deny Good was here on Liebert's behalf; indeed, his brief (p. 17) states that Good contacted plaintiff "on behalf of Liebert." The burden of proving jurisdiction is on the party asserting it. Chunky Corp. v. Blumenthal Bros. Chocolate Co., 299 F. Supp. 110, 114 (S.D.N.Y. 1969). Plaintiff has failed to meet this burden. Good's acts in New York "on behalf of Liebert" do not subject him to personal jurisdiction here, and the complaint against him should be dismissed.

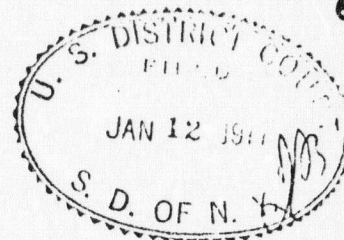
New York, New York
January 7, 1977

Respectfully submitted,

SEWARD & KISSEL
Attorneys for Defendants

Anthony R. Mansfield
Jon Paul Robbins
of Counsel

Bonsal
JUDGMENT
(pp. 60-61)



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
EUGENE E. NERVINA

Plaintiff

: 76 Civil 4841 (DBB)

-against-

LIEBERT CORPORATION, JOHN AMBROSE
and JAMES W. GOOD

Defendants
----- X

JUDGMENT

SEWARD & KISSEL
OFFICE COPY
ENTERED 1/17/77

Defendants having moved the Court pursuant to Rule 12(b), of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable Dudley B. Bonsal, United States District Judge, and the Court thereafter on January 10, 1977, having handed down its memorandum endorsement granting the said motion, it is,

ORDERED, ADJUDGED and DECREED: That defendants LIEBERT CORPORATION, JOHN AMBROSE and JAMES W. GOOD have judgment against plaintiff EUGENE E. NERVINA dismissing the complaint.

Dated: New York, N. Y.
January 12, 1977

Raymond J. Beaght
Clerk

RECEIVED

Index No. 76 Civ. 4841 (D.B.B.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EUGENE E. NERVINA,

Plaintiff,

-against-

LIEBERT CORPORATION, JOHN
AMEROSE and JAMES W. GOOD,

Defendants.

61

NOTICE OF MOTION AND
AFFIDAVIT

SEWARD & KISSEL

Attorneys for Defendants

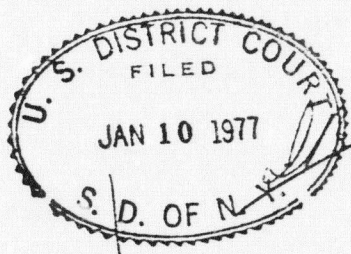
63 WALL STREET
NEW YORK, N. Y. 10005
212 248-2800

SEWARD R. KISSEL
Clerk
ENTERED 1/13/77

Motion granted after
oral argument.
It is so ordered.

January 10, 1977

W. P. Ruff
U. S. D. J.



MICROFILM
JAN 10 1977

Received Dec. 15/1976 R. Mahoney

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
USDC - SDNY
2/18/77

-----X
EUGENE E. NERVINA,

Plaintiff,

- against -

LIEBERT CORPORATION, JOHN
AMBROSE and JAMES W. GOOD,

Defendants.
-----X

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76 Civil 4841 (D.B.B.)

NOTICE OF APPEAL

Notice is hereby given that Eugene E. Nervina, plaintiff
above named, hereby appeals to the United States Court of Appeals
for the Second Circuit from an Order to Dismiss the Complaint,
entered in this action on the 10th day of January, 1977.

Dated: New York, New York
February 3rd, 1977

ANTHONY M. MAHONEY, ESQ.
Attorney for Plaintiff

By _____

Anthony M. Mahoney, Esq.

Office and P. O. Address
170 Broadway, Suite 201
New York, New York 10038

TO: SEWARD & KISSEL, ESQS.
Attorneys for Defendants
63 Wall Street
New York, New York 10005
Jon Paul Robbins, Esq.

FEDERA: CPIRT
FEDERAL COURT
SECOND CIRCUIT

EUGENE E. NERVINA,
Plaintiff-Appellant,

- against -

LIEBERT CORP. , JOHN AMBROSSE, and JAMES
W. GOOD,
Defendants-Appellees.

On Appeal from the United States Dist. Court for the
~~Southern Dist. of N. Y.~~

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 112 West 136th Street; New York, New York

That on the 30th day of March, 19 77 at 63 Wall Street
New York, N. Y.

deponent served the annexed

Seward & Kissel, Esqs. upon

Appendix and Brief

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 30th
day of March, 19 77

Robert T. Blum

James A. Steele

James A. Steele

ROBERT T. BLUM
NOTARY PUBLIC, State of New York
No. 123456789
County of New York
Comm. Expires 12/31/1977